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No. 89-825

In the Supreme Court of the United States

OCTOBER TERM, 1989

JOSEPH E. ENGLISH AND ELIZABETH ENGLISH INDIVIDUALLY AND AS GUARDIANS OF KERRIE ANN ENGLISH,
PETITIONERS,

v.

NEW ENGLAND MEDICAL CENTER, INC.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT,
FOR THE COMMONWEALTH OF MASSACHUSETTS

RESPONDENT'S BRIEF IN OPPOSITION

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I

QUESTIONS PRESENTED

1. Does M.G.L. c. 231, §85K, which establishes a limitation of liability of $20,000 for any cause of action based on tort against a charitable organization, satisfy the requirements of the equal protection clause of the United States Constitution?
2. Does M.G.L. c. 231, §85K satisfy the requirements of the due process clause of the United States Constitution?

RULE 28.1 LIST

Parent Corporation	New England Medical Center, Inc.
Subsidiary Corporations	New England Medical Center Hospitals, Inc.
	New England Medical Center Insurance Company
	Tufts-New England Medical Center, Inc.
	New England Health Care Foundation, Inc.
	Pratt Medical Group, Inc.
	NEMC Basic Research Corp., Inc.
	Community Practice Program, Inc.
	New England Health Resources (partnership)
	New England Real Estate Company, Inc.
	Transition Systems, Inc.
	Liability Limited, Inc.
	New England Long-Term Care, Inc.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent New England Medical Center, Inc. respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Massachusetts Supreme Judicial Court's opinion in this case.

Opinion Below

The opinion of the Massachusetts Supreme Judicial Court in this case is reported at 405 Mass. 423, 541 N.E.2d 329 (1989) and is reproduced in the appendix attached to the petition for writ of certiorari at pp. 1a to 24a.

Counterstatement of the Case

The respondent New England Medical Center, Inc. ("New England Medical Center") does not dispute the description of the procedural history of the case contained in the petitioners' Statement of the Case.

With respect to the decision by the Supreme Judicial Court, the Supreme Judicial Court affirmed the decision of the Superior Court reducing the verdict to $20,000. It held that M.G.L. c. 231, §85K did not violate the petitioners' right to a trial by jury, as guaranteed by Article 15 of the Declarations of Rights of the Massachusetts Constitution. The Supreme Judicial Court further held that because the statute bore a reasonable relationship to a legitimate state goal of preserving charitable assets, M.G.L. c. 231, §85K did not violate the equal protection or due process guarantees of the Massachusetts and United States Constitutions.

Reasons Why the Petition Should Be Denied

I. The Massachusetts Supreme Judicial Court Correctly Held That M.G.L. c. 231, §85K Does Not Violate The Equal Protection Clause Of The United States Constitution.

In their petition for a writ of certiorari, the petitioners argue that M.G.L. c. 231, §85K violates the equal protection clause of the United States Constitution because the legislative purpose of M.G.L. c. 231, §85K is not a legitimate purpose and because the classifications created by the statute are not reasonably related to its purpose. The petitioners further contend that an intermediate standard of review is the appropriate standard under equal protection analysis and that M.G.L. c. 231, §85K satisfies neither an intermediate standard of review nor the rational basis test. Consequently, the petitioners argue that the Massachusetts Supreme Judicial Court erred in finding that the statute satisfied federal equal protection requirements. (Petition, pp. 12-37).

The Massachusetts Supreme Judicial Court held that the appropriate standard of review is the rational basis test and that

M.G.L. c. 231, §85K plainly satisfies this test because it is rationally related to the legitimate legislative objective of protecting the funds of charitable institutions so that they may be devoted to charitable purposes. The Supreme Judicial Court also found that the common law right of a tort victim to recover damages does not trigger an intermediate equal protection standard. Because the Massachusetts Supreme Judicial Court applied the correct legal standard of review under equal protection analysis and properly held that M.G.L. c. 231, §85K satisfies equal protection requirements, there is no need for this Court to review that decision.

A. *The Massachusetts Supreme Judicial Court Correctly Applied The Rational Basis Test In Holding That M.G.L. c. 231, §85K Did Not Violate The Equal Protection Clause.*

Equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 312 (1976). Where a challenged provision neither adversely affects a fundamental right nor contains a classification based upon a suspect criterion, the provision is examined under the rational basis test, whereby the statute will be sustained if the legislature could have reasonably concluded that the challenged classification would promote a legitimate state purpose. *Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 195-196 (1983).

In determining whether a challenged classification is rationally related to the achievement of a legitimate state purpose, this Court will examine two questions: (1) whether the challenged legislation has a legitimate purpose, and (2) whether it was reasonable for the lawmaker to believe that use of the challenged classification would promote that purpose. *Western and Southern Life Ins. Co.* v. *State Board of Equalization*, 451 U.S. 648, 668 (1981). Legislatures are ordinarily presumed to have

acted constitutionally, and state laws are entitled to a presumption of validity against attack under the equal protection clause. *Clements* v. *Fashing*, 457 U.S. 957, 962-963 (1982); *Parham* v. *Hughes*, 441 U.S. 347, 351 (1979). Furthermore, the classification will be upheld if the question as to whether the legislation furthers a legitimate state goal is at least debatable. *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981).

A legislature may draw classifications "one step at a time", addressing problems in a piecemeal fashion, and a classification is not deficient simply because the state could have selected another means of achieving the desired end. *Clements* v. *Fashing*, *supra* at 969-970. A classification is not unconstitutional merely because it is imperfect. *Mathews* v. *de Castro*, 429 U.S. 181, 185 (1976). Moreover, a court examining a classification under the equal protection clause should not substitute its judgment of good public policy for that of the legislature. *Schweiker* v. *Wilson*, 450 U.S. 221, 234 (1981); *Parham* v. *Hughes*, *supra* at 351.

In examining social welfare legislation, the Supreme Court has generally upheld such legislation where it found that the legislation was rationally related to a legitimate state purpose. *See*, *e.g.*, *Bowen* v. *Gilliard*, 483 U.S. 587 (1987) (requirement that family wishing to receive welfare benefits include within its family unit child for whom child support payments are being made by noncustodial parent does not violate equal protection principles); *Lehr* v. *Robertson*, 463 U.S. 248 (1983) (state's failure to give putative father of illegitimate child notice of pending adoption proceedings, despite knowledge of his whereabouts, did not deny putative father equal protection); *Clements* v. *Fashing*, *supra* (state constitutional provisions regulating circumstances in which judges and other state employees could run for public office did not violate equal protection clause).

This Court has adopted the use of an intermediate standard to examine classifications based on gender and illegitimacy. *See*, *e.g.*, *Craig* v. *Boren*, 429 U.S. 190 (1976) (prohibition of sale of

3.2% beer to males under age of 21 and females under age of 18 violated equal protection clause); *Mills* v. *Habluetzel*, 456 U.S. 91 (1982) (one year statute of limitations on actions to determine paternity of illegitimate children violates equal protection). Under this intermediate standard, the challenged classification must serve important governmental objectives, *Craig* v. *Boren*, *supra* at 197, and must be substantially related to a legitimate state interest. *Mills* v. *Habluetzel*, *supra* at 99.

This Court has refused to apply a heightened standard of review, rather than the rational basis test, to social welfare legislation. Thus, in *Cleburne* v. *Cleburne Living Center*, 473 U.S. 432 (1985), this Court declined to hold that the mentally retarded constituted a "quasi-suspect" classification calling for a heightened degree of scrutiny. *See also Bowen* v. *Gilliard*, *supra* (no merit to argument that heightened scrutiny must be applied because amendment affects family's right to live in type of family unit it chooses); *Clements* v. *Fashing*, *supra* (not all ballot access questions require heightened equal protection scrutiny). *See also* Section I.B., *infra* at 8-17.

Finally, in those cases where this Court has invalidated state provisions under the rational basis test, it has done so because the challenged statute did not further *any* state interest or because there was no rational basis for the statute in the record. Thus, in *Cleburne* v. *Cleburne Living Center*, *supra*, this Court found that a zoning ordinance which excluded group homes for the mentally retarded violated the equal protection clause where the record did not reveal any rational basis for the exclusion and where the challenged classification rested on irrational prejudice. *See also U.S. Department of Agriculture* v. *Murry*, 413 U.S. 508 (1973) (statute denying food stamps to entire household containing persons 18 years and older who had been claimed as dependents for federal income tax purposes by taxpayers themselves ineligible for food stamps was not a rational measure of needs of household and hence violated equal protection).

In the instant matter, the petitioners allege that M.G.L. c. 231, §85K does not satisfy the rational basis test because the purpose of the statute is not legitimate and the classifications created are wholly unrelated to its stated purpose. The petitioners argue that the legislative purpose of M.G.L. c. 231, §85K — to protect the funds of charitable institutions so that they may be devoted to charitable purposes — is not a legitimate legislative purpose because special protections for charitable institutions are no longer necessary. Furthermore, the petitioners contend that such protections are not necessary for hospitals in particular because hospitals enjoy other special legislative protection.

The Massachusetts Supreme Judicial Court identified the legislative purpose behind the statute and found that such purpose was legitimate.

> The objective of §85K clearly is to protect the funds of charitable institutions so that they may be devoted to charitable purposes. That objective is just as clearly legitimate. If a charity's property were "depleted by the payment of damages its usefulness might be either impaired or wholly destroyed, the object of the founders or donors defeated, and charitable gifts, discouraged." *St. Clair* v. *Trustees of Boston Univ.*, 25 Mass. App. Ct. 662, 666 (1988), quoting *Farrigan* v. *Pevear*, 193 Mass. 147, 149 (1906).

405 Mass. at 429, 541 N.E.2d at 333. Furthermore, the Court found that the availability of other legislative protections for hospitals did not render the legislative purpose of protecting charitable assets for charitable goals unnecessary. "[T]he availability of these sources of protection of charitable funds is not inconsistent with a legislative purpose to provide still further protection." *Id.*

Plainly, the legislative purpose of protecting the funds of charitable institutions so that they may be devoted to charitable purposes is a legitimate public purpose. The statute is not based on prejudice or a desire to harm a politically unpopular group.

See, e.g., Cleburne v. *Cleburne Living Center, supra* (zoning ordinance requiring special permit for group home for the mentally retarded rested on an irrational prejudice against the mentally retarded); *U.S. Department of Agriculture* v. *Moreno*, 413 U.S. 528 (1973) (where purpose of statute denying food stamps to household containing individual unrelated to any other household member was to prevent "hippies" or "hippie communes" from participating in the food stamp program, such purpose was a bare congressional desire to harm a politically unpopular group and did not constitute a legitimate state interest).

Petitioners also argue that the limitation on charitable liability is not necessary, particularly as it applies to hospitals. These reasons — because hospitals can purchase insurance, because charities no longer need special protections — are all public policy arguments. Thus, such arguments are more appropriately addressed to the legislature than to the courts.

Next, the petitioners argue that even if the statute's public purpose is legitimate, the classifications created by the statute are not reasonably related to that purpose. However, the Supreme Judicial Court found that the statute's classifications were reasonably related to its purpose.

> The plaintiffs also argue that the discrimination between the victims of charitable tortfeasors and other victims, between the seriously injured victims of charitable tortfeasors and those with minor injuries, between "wealthy" charities and impoverished ones, and between charities and noncharities, wrought by §85K, cannot be viewed as a rational means of accomplishing the legislative objective, even if the objective is considered legitimate, of protecting charitable funds. The plaintiffs emphasize the low amount of the statutory cap, arguing that frequently the expenses involved in litigating a serious personal injury case against a hospital may far exceed the allowable recovery. Nevertheless, while we acknowledge the validity of the plaintiffs' assertion, it is not the court's prerogative to determine

> whether a more equitable distribution of the burden of negligently inflicted personal injuries could be devised. We cannot say that there is no rational relationship between §85K's cap on damages and the statute's legitimate objective of preserving charitable assets.

405 Mass. at 430, 541 N.E. 2d at 333. (Citations omitted.)

The statute's establishment of a $20,000 limitation on charitable liability represents a legislative balancing of the desirability of protection for charitable organizations against the interests of a person injured as a result of a tort for which the charitable organization is responsible. *See Forty-Sixth Annual Report of the Judicial Council of Massachusetts* 82 (1970) (included in appendix to petitioners' application at 34a to 39a). Plainly the statute represents a reasonable means of achieving a legitimate state goal. The petitioners' argument that charitable organizations no longer need special protection is likewise a public policy argument which, as the Supreme Judicial Court correctly noted, is more appropriately addressed to the legislature than the courts. Thus, the Massachusetts Supreme Judicial Court properly found that M.G.L. c. 231, §85K is rationally related to a legitimate state goal.

B. *This Court Should Not Apply A Heightened Standard Of Scrutiny To M.G.L. c. 231, §85K.*

The petitioners also request this Court to apply a heightened or intermediate standard of review under equal protection analysis to M.G.L. c. 231, §85K and further argue that M.G.L. c. 231, §85K fails to satisfy constitutional requirements under such a standard. Additionally, the petitioners argue that a number of states have used an intermediate equal protection standard in reviewing limitations on damage awards. (Petition, pp. 8-10, 29-37.)

However, this Court has utilized an intermediate standard of review only in limited circumstances, and the petitioners have failed to identify a right or type of classification in this case which would trigger such review. Furthermore, to the extent

that other states have utilized an intermediate standard, they have done so either pursuant to the terms of their own state constitutions or when both state and federal constitutional issues were present. Thus, the petitioners have failed to present an issue under federal law concerning the appropriateness of an intermediate standard of review and thus have presented no justification for this Court to extend the application of a heightened or intermediate standard of review for the purposes of equal protection analysis.

As noted above, the Supreme Court has traditionally utilized an intermediate standard of review only for two categories, gender and illegitimacy. *See, e.g., Craig* v. *Boren, supra* (gender); *Mills* v. *Habluetzel, supra* (illegitimacy). The standard to be applied in such cases is that "classifications by gender [and illegitimacy] must serve important governmental objectives and be substantially related to achievement of those objectives." *Craig* v. *Boren, supra* at 197.

In *Plyler* v. *Doe*, 457 U.S. 202 (1982), this Court used what appeared to be a heightened standard to review a Texas statute, without explicitly acknowledging that it was doing so. In *Plyler*, the Texas statute permitted school boards to deny a free public education to students who could not prove that they were legally admitted aliens. The Court rejected the claim that "illegal aliens" were a suspect class or that education was a fundamental right, either of which would have triggered strict scrutiny under equal protection analysis.

However, the Court was reluctant to permit the Texas statute to impose legal disabilities upon the minor children of illegal aliens where such children were unable to affect their parents' conduct or their own legal status. Furthermore, the Court noted that education plays a pivotal role in maintaining the nation's political and cultural heritage and that the denial of an education forecloses the means by which any group might advance itself, thereby creating a permanent underclass of society. The Court noted:

> [The denial of a public education] imposes a lifetime of hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.

Id. at 223. For these reasons, the Court determined that the statute would not be considered rational "unless it further[ed] some substantial goal of the State", *id.* at 224, a standard which has traditionally been viewed as a heightened or intermediate standard of review. Applying this standard of review, the Supreme Court found that the Texas statute violated the equal protection clause.

However, the Supreme Court has refused to extend the use of the heightened or intermediate standard of review beyond the facts of the *Plyler* case. In *Cleburne* v. *Cleburne Living Center*, *supra*, decided in 1985, the Supreme Court refused to apply a heightened standard of review to a classification affecting the mentally retarded. First, this Court noted that it had previously refused to extend heightened review to differential treatment based on age in *Massachusetts Board of Retirement* v. *Murgia*, *supra*, because the aged, though not wholly without discriminatory treatment, had not experienced a history of purposeful unequal treatment and had not been subjected to unique disabilities on the basis of stereotypical characteristics not truly indicative of their abilities. *Cleburne* v. *Cleburne Living Center*, *supra* at 441.

In *Cleburne*, this Court declined to find that the mentally retarded were a "quasi-suspect" class. The Court articulated several reasons. First, the Court noted that there was a legitimate reason to treat the mentally retarded differently in some respects because they did have a reduced ability to function in the everyday world. Second, the Court noted that federal and state legislatures had addressed their unique problems, thus

belying a continuing antipathy or prejudice. Third, the Court found that the mentally retarded were not politically powerless or unable to attract the attention of lawmakers. Finally, the Court stated that if the mentally retarded, a large and amorphous class, were deemed quasi-suspect, it would be difficult to find a principled way to distinguish a variety of other groups (such as the aging, the disabled, the mentally ill, and the infirm) who perhaps had immutable disabilities, who could not mandate a desired legislative response, and who could claim some degree of prejudice from the public at large. *Id.* at 442-446. Noting that its refusal to recognize the mentally retarded as a quasi-suspect class did not leave them entirely unprotected from individious discrimination, the Court applied the rational basis test to the classification at issue and found it to be a violation of equal protection.

In *Lyng* v. *Castillo*, 477 U.S. 635 (1986), this Court again refused to extend the application of a heightened standard of review. In *Lyng*, the Court examined a federal statute in the food stamp program which treated family members (parents, children, and siblings) who lived together as a single household for the purpose of the food stamp program, thus reducing their benefits or eliminating their eligibility for benefits, but which did not treat more distant relatives or groups of unrelated persons as a single household unless they customarily purchased food and prepared meals together.

The Court again refused to apply a heightened degree of scrutiny. It found that "close relatives" were not a suspect class or even a "quasi-suspect" class because they had not been subjected to discrimination, they did not exhibit obvious immutable, distinguishing characteristics that defined them as a discrete group, and they were not a minority or politically powerless. *Id.* at 638. Similarly, it found that the statute did not "directly and substantially" interfere with family living arrangements and thereby burden a fundamental right. *Id.* Consequently, the Court applied the rational basis test and found the statute to be constitutional. *See also Bowen* v.

Gilliard, *supra* (Supreme Court refused to apply heightened review to statute which required applicants and recipients of public assistance to include in filing unit children living in same home, but for whom support payments were being received from noncustodial parent, because close relatives were not a suspect class and statute did not burden a fundamental right by affecting family living arrangements).

Finally, in *Kadrmas* v. *Dickinson Public Schools*, ____ U.S. ____, 108 S.Ct. 2481 (1988), this Court once again refused to extend the use of a heightened scrutiny beyond *Plyler*. In *Kadrmas*, the petitioners challenged the constitutionality of a state statute permitting some school districts to charge a user fee for bus transportation on equal protection grounds and argued that heightened scrutiny should be utilized. Noting that "[d]oing so would require us to extend the requirements of the Equal Protection Clause beyond the limits recognized in our cases," the Court declined to take such a step. *Id.* at 2487.

The Court noted that it had previously rejected the suggestion that "statutes having different effects on the wealthy and the poor should on that account alone be subjected to strict equal protection scrutiny" and that it had not "accepted the propositon that education is a 'fundamental right,' like equality of the franchise, which should trigger strict scrutiny. . . ." *Id.* With respect to heightened scrutiny, the Court noted that, outside of gender and illegitimacy, it had utilized a heightened scrutiny only in *Plyler* v. *Doe*. However, it refused to extend *Plyler* beyond the "unique circumstances" of that case. *Id.* at 2487-2488. The Court found that, unlike *Plyler*, the statute in *Kadrmas* did not penalize children for the illegal conduct of their parents, nor did the user fee promote the creation and perpetration of a sub-class of illiterates adding to the problems and costs of unemployment, welfare, and crime. Nor did the statute in *Kadrmas* completely bar the affected class from an important government service. *Id.* at 2488. Under these circumstances, the Court utilized the rational basis test and found the statute constitutional.

In the instant matter, the petitioners have not identified a classification or a right which would trigger a heightened degree of scrutiny. The class of victims of charitable tortfeasors, as compared to victims of non-charitable tortfeasors, is not a class which has been subjected to purposeful discrimination; they do not exhibit obvious, immutable, distinguishing characteristics which define them as a discrete group; nor are they a minority or politically powerless. Furthermore, if education is not a fundamental right, then the right to recover damages for personal injuries is likewise not a fundamental or quasi-fundamental right.

Moreover, the petitioners' access to the judicial system was not completely and irrevocably barred in all respects. The petitioners' right to recover damages for personal injuries was not barred. Rather, with respect to a charitable tortfeasor, their right to sue for damages for personal injuries was modified by permitting the petitioners to recover damages only up to $20,000. Their right to sue other alleged tortfeasors was unchanged. Indeed, the petitioners in fact presented their case against the non-charitable defendants, two physicians, to the jury, but did not prevail on these claims.

The petitioners also argue that, in applying federal equal protection standards to damage cap statutes, a majority of state courts have used an intermediate standard. (Petition, pp. 29-30.) However, a review of the decisions cited by the petitioners reveals that these courts were relying either jointly on federal and state constitutional provisions or solely on state constitutional provisions. Thus, because these cases did not rely solely on federal equal protection analysis, they do not demonstrate a need for clarification of federal constitutional law with respect to limitation of damages in personal injury actions. *See Arneson* v. *Olson*, 270 N.W.2d 125 (N.D. 1978) (relied primarily on state equal protection analysis, although also found violation of federal equal protection); *Carson* v. *Maurer*, 120 N.H. 925, 424 A.2d 825 (1980) (relied on state equal protection, recognizing that state constitution may be

interpreted to grant more rights than federal constitution); *Duren* v. *Suburban Community Hospital*, 24 Ohio Misc. 2d 25, 482 N.E.2d 1358, *repub. as corrected*, 495 N.E.2d 51 (1985) (found violation of equal protection under state and federal constitutions without explicitly adopting intermediate standard).[1]

Furthermore, the two states which relied solely on federal law and which used an intermediate standard were decided in 1975 or 1976, before this Court clarified the use of the intermediate equal protection standard in *Plyler*, *Cleburne*, *Lyng*, and *Kadrmas*. *See Jones* v. *State Board of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977) (noted that Supreme Court seemed to have declared a new category of equal protection analysis); *Hunter* v. *North Mason High School*, 85 Wash. 2d 810, 539 P.2d 845 (1975) (presentment or notice of claim statute passes neither "minimum scrutiny" nor "newer 'substantial relation' test").[2] Thus, these

[1] The petitioners also cite *Baptist Hospital of Southeast Texas, Inc.* v. *Baber*, 672 S.W.2d 296 (Tex. App. 1984), *writ ref'd, n.r.e.*, 714 S.W.2d 310 (Tex. 1986), for the proposition that it used an intermediate standard in finding an equal protection violation. However, *Baptist Hospital* does not state whether it was decided under state or federal equal protection, nor does it explicitly adopt an intermediate standard. Furthermore, the continued validity of its holding is in doubt for two reasons. First, the Texas Supreme Court, in reviewing the intermediate appellate court's decision, stated that the Court of Appeals need not have decided the constitutional issues and therefore the Texas Supreme Court did not pass on the constitutionality of the damage limitation provision. 714 S.W.2d at 310. Second, although *Baptist Hospital* has not been expressly overruled, it appears that its holding with respect to federal equal protection is no longer valid. In *Lucas* v. *United States*, 807 F.2d 414 (5th Cir. 1986), the Fifth Circuit examined the same statute reviewed in *Baptist Hospital*, a statute which establishes a $500,000 limit on damages in medical malpractice actions, and held that it did not violate federal due process or equal protection guarantees. However, the Fifth Circuit certified questions to the Texas Supreme Court concerning the statute's validity under the Texas Constitution. In *Lucas* v. *United States*, 757 S.W.2d 687 (Tex. 1988), the Texas Supreme Court found that the statute violated the open courts provision of the Texas Constitution.

[2] Petitioners cite this case for the proposition that a state court used an intermediate standard under a state constitution. (Petition, p. 31.) However, *Hunter* is decided on federal equal protection grounds.

cases do not stand for the proposition that state courts were following *current* federal precedent when they adopted an intermediate standard of review for the purposes of equal protection analysis.

Finally, the one case the petitioners cite for the proposition that state courts, are using an intermediate equal protection standard in construing state equal protection provisions relied on a state constitutional provision guaranteeing open access to the courts rather than state equal protection. *Lucas* v. *United States*, 757 S.W.2d 687 (Tex. 1988).

Furthermore, a number of courts have used the rational basis test in examining the constitutionality of limitations on recoveries. *See generally Fein* v. *Permanente Medical Group*, 38 Cal. 3d 137, 211 Cal. Rptr. 368, 695 P.2d 665 (1985), *appeal dismissed*, 474 U.S. 892 (1985) (limitation of $250,000 on non-economic damages in medical malpractice actions; federal and state grounds; rational basis test; no equal protection violation); *American Bank & Trust Co.* v. *Community Hospital*, 36 Cal. 3d 359, 204 Cal. Rptr. 671, 683 P.2d 670 (1984) (requirement in medical malpractice actions that future damages in excess of $50,000 be paid in periodic payments; federal and state grounds; rational basis test; no equal protection violation); *Jetton* v. *Jacksonville Authority*, 399 So.2d 396 (Fla. App. 1981) (limitation of $50,000 on governmental liability; federal and state grounds; rational basis test; no equal protection violation); *Cargill* v. *Rochester*, 119 N.H. 661, 406 A.2d 704 (1979), *appeal dismissed*, 445 U.S. 921 (1980) (limitation of $50,000 on governmental liability; federal and state grounds; rational basis test; no equal protection violation); *Brown* v. *Wichita State University*, 219 Kan. 2, 547 P.2d 1015 (1976), *appeal dismissed*, 429 U.S. 806 (1976) (governmental immunity; federal and state grounds; rational basis test; no equal protection violation); *Cauley* v. *Jacksonville*, 403 So.2d 379 (Fla. 1981) (limitation of $100,000 on governmental liability; federal and state grounds; rational basis test; no equal protection violation); *Crowe* v. *John W. Harton Memorial Hos-*

pital, 579 S.W.2d 888 (Tenn. App. 1979) (limitation of $20,000 on governmental liability; federal and state grounds; rational basis test; no equal protection violation).

Finally, utilizing a rational basis test in the instant case did not result in a cursory or formalistic review of the statute. A review of the Supreme Judicial Court's decision in the instant matter demonstrates that it engaged in a thoughtful and careful analysis of the issues.

> We agree with the plaintiffs that equal protection analysis requires the court to look carefully at the purpose to be served by the statute in question and at the degree of harm to the affected class. We have observed that characterizing the tests to be applied to determine the constitutional validity of legislation as "reasonable relation" and "strict scrutiny" is a "shorthand for referring to the opposite ends of a continuum of constitutional vulnerability determined at every point by the competing values involved." *Marcoux* v. *Attorney General*, 375 Mass. 63, 65 n. 4, 375 N.E.2d 688 (1978). However, our acceptance of that method of analysis does not require us to adopt a third level of review. The rational basis test "includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class." *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 452 (1985) (Stevens, J., concurring). In connection with such an analysis, the significance of a limitation of $20,000 on recovery against charities for personal injuries is a relevant factor.

405 Mass. at 428, 541 N.E.2d at 333. Thus, the Supreme Judicial Court made a thoughtful and deliberate examination of the classification made by the statute in its application of the rational basis test.

The petitioners have not identified a classification or a right which, under equal protection analysis, triggers or which

ought to trigger an intermediate standard of review. Therefore, this Court should decline to review this case in order to determine whether it should extend the use of an intermediate standard of review.

II. The Massachusetts Supreme Judicial Court Correctly Held That M.G.L. c. 231, §85K Does Not Violate The Due Process Clause Of The United States Constitution.

In their petition, the petitioners argue that the Supreme Court should resolve, with respect to the federal due process clause, the question of whether a state may modify or abolish a common law right without providing a satisfactory *quid pro quo* by requiring a *quid pro quo* under those circumstances. The petitioners argue further that M.G.L. c. 231, §85K violates the due process clause of the United States Constitution because it fails to provide a *quid pro quo*. (Petition, pp. 37-43.) However, the Supreme Judicial Court correctly held that the statute bears a reasonable relationship to a legitimate legislative objective and hence does not violate the due process clause. Moreover, it is unnecessary to decide whether a *quid pro quo* is constitutionally required.

A. *The Massachusetts Supreme Judicial Court Correctly Held That M.G.L. c. 231, §85K Bears A Rational Relationship To A Legitimate Legislative Goal.*

The requirements of the federal due process clause are satisfied if a statute has "a reasonable relation to a proper legislative purpose, and [is] neither arbitrary nor discriminatory." *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 398 (1937). Economic legislation — legislation which represents a legislative effort to structure and accommodate the burdens and benefits of economic life — comes to the Court with a presumption of constitutionality, and the burden is on the one complaining of a due process violation to establish that the

legislature has acted in an arbitrary and irrational way. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 83 (1978).

Courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws, and courts are not concerned with the wisdom, need or appropriateness of legislation. *Ferguson* v. *Skrupa*, 372 U.S. 726, 730 (1963). Legislative bodies have broad scope to experiment with economic problems. *Id.* Courts exceed their authority when they merely substitute their policy judgment for that of the legislative body. *See generally Hodel* v. *Indiana*, 452 U.S. 314 (1981) (federal statute governing surface coal mining operations conducted on farmland was not irrational, arbitrary and capricious, and lower court, in finding statute unconstitutional, had impermissibly substituted its policy judgment for that of Congress).

In the instant matter, the Supreme Judicial Court applied the standard described above to M.G.L. c. 231, §85K and found that the statute did not violate the petitioners' due process rights:

> In addressing the plaintiffs' equal protection argument, we determined that §85K is rationally related to a permissible legislative objective. Further discussion is not required. We conclude that §85K does not offend the plaintiffs' due process rights.

405 Mass. at 431, 541 N.E.2d at 334. Thus, the Massachusetts Supreme Judicial Court correctly found that the statute did not violate the due process clause of the United States Constitution.

B. *This Court Does Not Need To Decide Whether A State Must Provide A* Quid Pro Quo *When It Abolishes A Common Law Right.*

The petitioners request the Court to decide whether a state must provide a satisfactory *quid pro quo* when it modifies or

abolishes a common law right.[3] In *Duke Power Co.* v. *Carolina Environmental Study Group, Inc., supra*, this Court stated that it did not need to resolve this question with respect to the Price-Anderson Act, which established a limitation of liability for accidents resulting from the operation of federally licensed private nuclear power plants, because the Price-Anderson Act did provide a reasonably just substitute for the common law tort remedies it replaced. *Id.* at 88. However, in *Duke Power*, the Court also stated that it was not at all clear that the due process clause required a reasonable substitute remedy when common law rights are modified or abrogated. *Id.* The Court noted that a person has no property or vested interest in any rule of the common law and that the Constitution did not forbid the creation of new rights or the abolition of old ones recognized by common law to attain a permissible legislative object. *Id.* at n. 32. The Court also noted that statutes limiting liability are relatively commonplace and have consistently been enforced by the courts. *Id.*

In Massachusetts, the Supreme Judicial Court previously resolved this question in *Klein* v. *Catalano*, 386 Mass. 701, 437 N.E.2d 514 (1982), when it held that M.G.L. c. 260, §2B, which completely abrogated a cause of action in tort against an architect, engineer or design professional six years after the design professional completed his work, did not violate the federal due process clause, even though it did not provide an alternative remedy. Citing *Silver* v. *Silver*, 280 U.S. 117 (1929), which upheld the constitutionality of a state statute abrogating tort actions by guest passengers in automobiles, the Supreme Judicial Court noted that the United States Constitution permits the legislature to abolish causes of action once

[3] Initially, it should be noted that M.G.L. c. 231, §85K does not modify a prior unrestricted common law right to sue charities for tort damages in any amount. Prior to the statute's enactment, charities enjoyed complete immunity. *See MacDonald* v. *Massachusetts General Hospital*, 120 Mass. 432 (1876). M.G.L. c. 231, §85K abolished the defense of charitable immunity which existed prior to the enactment of the statute, but limited the charity's liability to the sum of $20,000.

recognized by the common law to further permissible legislative objectives. 386 Mass. at 712, 437 N.E.2d at 521-522.

The petitioners contend that there is a dispute among state courts and courts of appeals as to whether a satisfactory *quid pro quo* is constitutionally required. However, those decisions requiring a satisfactory *quid pro quo* were decided either jointly on federal and state grounds or solely on state grounds. Therefore, a decision on whether the *federal* due process clause requires a satisfactory *quid pro quo* would have little or no effect with respect to these decisions. *See Carson* v. *Maurer*, *supra*, (limitation of $250,000 on non-economic damages in medical malpractice actions; absence of *quid pro quo* violates state equal protection); *Kansas Malpractice Victims Coalition* v. *Bell*, 243 Kan. 333, 757 P.2d 251 (1988) (limitation on non-economic damages of $250,000 and on all damages of $1 million in medical malpractice cases; absence of *quid pro quo* violates state constitutional guarantees of right to jury trial and to a remedy by due course of law); *Lucas* v. *United States*, *supra* (limitation of $500,000 on damages in medical malpractice actions; absence of *quid pro quo* violates state constitutional "open courts" provision); *Simon* v. *St. Elizabeth Medical Center*, 3 Ohio Op.3d 164, 355 N.E.2d 903 (1976) (limitation of $200,000 on damages in medical malpractice actions; absence of *quid pro quo* denies state and federal equal protection).

Several courts have found that no satisfactory *quid pro quo* was constitutionally required, but nonetheless still found a statutory limitation on liability to be in violation of federal or state constitutional requirements. *See Arneson* v. *Olson*, *supra* (limitation of $300,000 on damages in medical malpractice actions; even though no *quid pro quo* is required, limitation violated federal and state equal protection); *Wright* v. *Central DuPage Hospital Ass'n.*, 632 Ill.2d 313, 347 N.E.2d 736 (1976) (limitation of $500,000 on medical malpractice damages; *quid pro quo* not required; violation of state constitutional provision against special privileges found). Thus, where these courts

found limitation of liability provisions to be violations of various constitutional provisions, even though they held that a satisfactory *quid pro quo* was not constitutionally required, federal guidance on the issue of whether a satisfactory *quid pro quo* is required would likewise have had no effect on these decisions.

The petitioners have failed to demonstrate that there is a dispute among state and federal jurisdictions as to whether or not a *quid pro quo* is required under the *federal* constitution. In the absence of such a showing, this Court should decline to review the decision of the Supreme Judicial Court.

III. The Petitioners Have Not Sufficiently Demonstrated A Conflict Between Decisions Of State And Federal Jurisdictions Concerning A Federal Question.

The petitioners argue that there is a conflict among state and federal jurisdictions concerning the application of federal equal protection and due process guarantees to statutes establishing limitations of liability on damages awards. (Petition, pp. 7-12.) However, to the extent that any such conflict exists, it is caused by the application of either state constitutional provisions or state and federal constitutional provisions jointly to statutes establishing limitations on damage awards. Consequently, the petitioners have failed to demonstrate a conflict among the jurisdictions concerning a *federal* question which merits review by this Court.

With respect to federal equal protection analysis, the petitioners argue that the conflict among jurisdictions has arisen from the lack of consistency concerning the applicable standard of review. The petitioners further argue that a majority of courts which have addressed the issue have utilized an intermediate or heightened degree of scrutiny to strike down statutes establishing limitations on damage awards. (Petition, pp. 8-9.)

However, all but one of the cases cited by the petitioners rely either solely on state constitutional provisions or jointly on

state and federal constitutional provisions. Thus, these cases do not demonstrate a conflict concerning the application of federal constitutional law. *See Arneson* v. *Olson*, *supra* ($300,000 limitation on medical malpractice actions violates state and federal equal protection and due process); *Carson* v. *Maurer*, *supra* ($250,000 limit on non-economic damages violates state equal protection); *Duren* v. *Suburban Community Hospital*, *supra* ($200,000 limit on medical malpractice damages violates federal and state equal protection and due process).[4]

Furthermore, the one case cited by the petitioners which relied exclusively on federal law and which utilized an intermediate standard of equal protection analysis was decided in 1976, before the Supreme Court clarified the limited circumstances under which an intermediate standard of review would be used. *See Jones* v. *State Board of Medicine*, *supra*. *See also Section I.B.*, *supra* at 8-17.

The petitioners state that one case, *White* v. *Montana*, 203 Mont. 363, 661 P.2d 1272 (1983), utilized strict scrutiny to review a statute establishing a limit on medical malpractice awards. However, *White* was decided exclusively on state constitutional grounds.[5] Furthermore, the Montana Supreme Court overruled *White* in *Meech* v. *Hillhaven West, Inc.*, ____ Mont. ____, 776 P.2d 488 (1989), where it held that the right to sue for damages was not a fundamental right and hence would be judged by the rational basis test and not the strict scrutiny test.[6]

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[4] The petitioners also cite *Baptist Hospital of Southeast Texas, Inc.* v. *Baber*, *supra*. See n. 1 concerning the continued validity of the holding in *Baptist Hospital*.

[5] In *White*, the Montana Supreme Court found that the right to bring a civil action for personal injuries was a fundamental right because it arose from the state constitutional provision guaranteeing all persons a speedy remedy for every injury. Because the strict scrutiny test was not satisfied, the Montana court held that a statute which prohibited recovery for all non-economic damages from the state and which limited economic damages was unconstitutional under the state constitutional equal protection provision.

[6] In *Meech*, the Montana Supreme Court, in reviewing a statute limiting damages in wrongful discharge cases, held that the state constitutional provi-

As petitioners concede, a number of jurisdictions have used the rational basis test in determining whether statutory limitations on damage awards satisfied equal protection requirements. *See* Section I.B., *supra* at 8-17. Thus, the petitioners have not demonstrated a conflict concerning the appropriate standard of review under federal equal protection analysis which necessitates review by this Court.

The petitioners also contend that a question left unresolved in *Duke Power Co.* as to whether a *quid pro quo* is constitutionally required when a state abrogates a common law remedy should be also resolved by this Court. (Petition, pp. 10-12.) However, with respect to this question as well, the petitioners have failed to demonstrate a conflict concerning federal constitutional law.

As discussed above, because the decisions holding that a satisfactory *quid pro quo* is required were decided either jointly on state and federal grounds or solely on state grounds, a decision on whether the federal due process clause requires a satisfactory *quid pro quo* would not necessarily have an effect on these decisions. *See, e.g., Carson* v. *Maurer, supra* (limitation of $250,000 on non-economic damages in medical malpractice actions; absence of *quid pro quo* violates state equal protection). *Kansas Malpractice Victims Coalition* v. *Bell, supra* (limitation on non-economic damages of $250,000 and on all damages of $1 million in medical malpractice cases; absence of *quid pro quo* violates state constitutional guarantees of right to jury trial and to a remedy by due course of law); *Lucas* v. *United States, supra* (limitation of $500,000 on damages in medical malpractice actions; absence of *quid pro quo* violates state constitutional "open courts" provision); *Simon* v. *St. Elizabeth Medical Center, supra* (limitation of $200,000 on

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sion construed in *White* did not give rise to a fundamental right to full legal redress. Therefore, limitations or restrictions on damage awards would be judged by the rational basis test, rather than by the strict scrutiny test. Applying the rational basis test to the statute at issue, which limited damages in wrongful discharge cases, the Montana Supreme Court held that it satisfied state equal protection requirements.

damages in medical malpractice actions; absence of *quid pro quo* denies state and federal equal protection). *See also* Section II.B., *supra* at 18-21.

Furthermore, where a state found that the statute violated due process even though no *quid pro quo* is constitutionally required, a decision on whether the federal due process clause requires a satisfactory *quid pro quo* would not produce a different result. *See, e.g., Arneson* v. *Olson, supra* (limitation of $300,000 on damages in medical malpractice actions; even though no *quid pro quo* required, limitation violated federal and state equal protection). *Wright* v. *Central DuPage Hospital Ass'n., supra* (limitation of $500,000 on medical malpractice damages; *quid pro quo* not required; violation of state constitutional provision against special privileges found).

Finally, as a general matter, most of the decisions examining the constitutionality of statutory limitations on damages have addressed challenges to the statutes on both state and federal grounds. *See Fein* v. *Permanente Medical Group, supra* ($250,000 limit on non-economic damages; challenged on federal and state equal protection and due process; statute upheld); *Johnson* v. *St. Vincent Hospital, Inc.*, 273 Ind. 374, 404 N.E.2d 585 (1980) ($500,000 limitation on medical malpractice damages; challenged on federal and state due process and equal protection and state constitutional rights to jury trial and remedy by due course of law; statute upheld); *Etheridge* v. *Medical Center Hospitals*, 237 Va. 87, 376 S.E.2d 525 (1989) (limit of $750,000 on medical malpractice damages; challenged on federal and state due process, state constitutional rights to a jury trial, separation of powers, and prohibition of special legislation, and federal equal protection; statute upheld). Indeed, in the instant case, M.G.L. c. 231, §85K was challenged on multiple federal and state grounds — federal and state equal protection and due process and the state constitutional right to a jury trial.

Several statutes have been challenged solely on state constitutional grounds. *See Carson* v. *Maurer, supra* (limit of

$250,000 on non-economic damages in medical malpractice actions; challenged on state equal protection grounds; statute found unconstitutional); *Lucas* v. *United States*, *supra* (limit of $500,000 on damages in medical malpractice actions; challenged on state constitutional provision guaranteeing open access to courts; statute found unconstitutional); *Kansas Malpractice Victims Coalition* v. *Bell*, *supra* (limit of $250,000 on non-economic damages and $1 million on all damages in medical malpractice actions; challenged on state constitutional rights to jury trial and to remedy by due course of law; statute found unconstitutional).

Because the validity of state statutes establishing limitations on damage awards have involved both state and federal constitutional grounds and sometimes solely state constitution grounds, resolution of the two federal questions raised by the petitioners — whether an intermediate equal protection standard should be utilized and whether the federal due process clause requires a satisfactory *quid pro quo* when a common law right is abolished — will not resolve the conflict among the states concerning the validity of such statutes. To the extent there is a conflict, it is not a conflict concerning a *federal* question. Therefore, this Court should decline to review the decision of the Massachusetts Supreme Judicial Court.

Conclusion

For the reasons discussed above, the respondent New England Medical Center, Inc. respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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